IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY HARGROVE	:	CIVIL ACTION
	:	
v.	:	
	:	
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, ET AL	:	NO. 99-1910

M E M O R A N D U M

Padova, J.

Petitioner, Anthony Hargrove, a state prisoner incarcerated at the State Correction Institute in Frackville, Pennsylvania, filed a pro se Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. In accordance with 28 U.S.C. § 636(b)(1)(B) (West 1993) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Jacob P. Hart for a Report and Recommendation ("Report"). Magistrate Judge Hart recommends that the Court dismiss the Petition; Petitioner filed timely objections. For the following reasons, I will overrule Petitioner's objections, adopt the Magistrate Judge's Report, and deny the Petition.

I. FACTS AND PROCEDURAL HISTORY

On June 15, 1988, the Court of Common Pleas for Philadelphia County, Pennsylvania, sentenced Anthony Hargrove to a term of two to fifteen years for the crime of robbery.

Since 1990, Hargrove has been paroled four times. Hargrove was first granted parole on March 30, 1990, which was revoked on

March 6, 1991 for a technical parole violation. He was granted parole a second time three months later, on June 23, 1991, which was revoked for the same reason as his first revocation on January 23, 1992. Hargrove's third parole grant occurred on March 2, 1993, and due to a new conviction, it was revoked on July 9, 1993.

He was most recently paroled on January 12, 1998. On August 20, 1998, his parole was revoked for having tested positive for cocaine. The Board assessed him a ten-month backtime penalty during which he would not be eligible for parole. Following the expiration of his backtime, Hargrove was again reviewed for parole and denied in February, 1999. Hargrove remains in prison in Frackville, Pennsylvania, due to be reviewed again for parole in February, 2000.

Hargrove's present petition in this Court stems entirely from this last parole revocation, and the denial of reparole that occurred after it. Hargrove presents one ground upon which he believes habeas corpus should be granted, originating primarily from what he believes to be a denial of due process rights under the Fourteenth Amendment.[1] The Court construes Hargrove's due

[1] Hargrove's only ground for relief states:
THE BOARD'S DISCRETION IS REVIEWABLE TO DETERMINE IMPROPRIETIES TO DUE PROCESS, WHEN THE DISCRETION LACK CONCRETE CRITERIA TO SUPPORT ITS ORDER DENYING REPAROLE. The petitioner was assessed a ten month backtime penalty for violating Condition #5A (Use of Drugs) of the Pennsylvania Conditions of Parole. A Review Date, in or after February 1999 was scheduled. A Review Date is a board hearing to determine the context of the petitioner's rehabilitative adjustment during the ten backtime [sic] period.

process claim to hinge on a characterization of his most recent reparole denial as an excessive and unsubstantiated "backtime" penalty, discussed below.

By Order dated May 3, 1999, this Court referred the Petition to Magistrate Judge Jacob P. Hart for a Report and Recommendation. On June 16, 1999, Judge Hart filed his Report and recommended that Hargrove's Petition be denied. Hargrove filed Objections to the Report on July 1, 1999.

II. STANDARD OF REVIEW

Hargrove filed his petition pursuant to 28 U.S.C. § 2254(a), which may be filed by "a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214, made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions. Section 2254(d)(1), as amended by AEDPA, provides:

> After the Review Hearing in February, the Board published a continued incarceration order assessing the petitioner with an additional twelve month penalty. The assessment was supported by a conclusory statement not related to the evidence on record. The Board's statement euphemistically inferred that the petitioner was a danger and threat to the community. The evidence on record supporting the technical parole violation was drug unsafe [sic] only, not any evidence of additional criminal behavior related to the petitioner's conviction for robbery.

(Pet. at 6.)

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States....

28 U.S.C.A. § 2254(d)(1) (West 1999). A habeas writ should not be granted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 890 (3d Cir. 1999). Federal courts may also consider the decisions of inferior federal courts when evaluating whether the state court's application of the law was reasonable. Id.

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.... [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b) (West 1993).

III. DISCUSSION

Before moving to any analysis of Hargrove's exhaustion of state remedies or the merits of his claim, this Court must first determine whether or not Hargrove managed to state any sufficient

ground for relief. Hargrove's primary argument is rather technical, but its essence is that the parole board violated his due process rights when it denied his request for reparole on February 9, 1999.

A review of the facts surrounding this most recent denial is critical. The Board's revocation of Hargrove's parole and his subsequent recommittal to prison stemmed from a single technical violation of his parole on August 20, 1998, when Hargrove tested positive for cocaine use. The Board held a revocation hearing and assessed a ten-month backtime penalty.[2] (Pet. at 17.) A single technical violation carries a presumptive backtime range of 5 to 12 months. 37 Pa. Cons Stat. Ann § 75.4 (West 1999).

The Board stated in its decision that Hargrove would be eligible for a parole hearing after his backtime had expired, in February, 1999. (Pet. at 17.) When Hargrove's backtime had expired, the Board reviewed him for parole, as they would for any other prisoner who met certain eligibility requirements for parole review. Hargrove was denied parole in a decision dated February 9, 1999. (Pet. at 18.) The decision also stated that Hargrove would be reviewed again for parole after a year had passed: in February, 2000. Id.

It is this year between the parole review of February, 1999,

[2] "Backtime" is the term given to prisoners who are ordered to serve some of the time they spent on parole back in prison. Therefore, backtime is not counted against the remaining time left on a sentence. After backtime is served, however, prisoners begin to serve time against their sentence again.

and February, 2000, on which Hargrove bases his rather technical claim of due process violation. By characterizing the parole review of February, 1999, as a review of the initial ten month backtime he was assessed in his revocation hearing, Hargrove concludes that the statement that he would not be reviewed again until February of 2000 equaled an assessment of an additional twelve months of backtime. (Pet'r. Mem. at 1.) The difference is critical: assessments of backtime penalties in excess of the presumptive range require the Board to explain its reasons in great detail. 37 Pa. Cons Stat. Ann § 75.3 (West 1999).

Having characterized the time between the February, 1999, decision and his next parole review as an additional twelve months of backtime, Hargrove then asserts that the Board violated his rights by failing to explain its reasons for "deviating" from the presumptive range of backtime usually assessed. (Pet'r Mem. at 4.) In support of his conclusion, Hargrove cites to Duncan v. Pa. Board of Probation and Parole, 687 A.2d 1179 (Pa. Commw. Ct. 1996), where a prisoner was assessed a 48-month backtime penalty for a single technical violation of parole. Appealed directly from Duncan's revocation hearing, the court concluded that the Board had not sufficiently explained its reasons for assessing Duncan 48 months of backtime for a single technical parole violation. Duncan, 687 A.2d at 1180-81.

Importantly, Duncan concerns itself only with the backtime

assessed at the revocation hearing. Id. Here, Hargrove does not challenge the backtime assessed after his revocation hearing in September, 1998. (Pet'r. Mem. at 3. ("[t]he initial assessment meted out to the petitioner was substantiated and within the presumptive range.").) Rather, Hargrove attempts to characterize the time between the February, 1999, review and the February, 2000, review as a continuation of backtime penalty. (Pet'r. Mem. at 2.) Such a characterization is necessary in order to exceed the presumptive range, triggering the procedural safeguards discussed in Duncan concerning excessive backtime penalties. Id.

Hargrove points to no reason in his petition or supporting memorandum why the parole board's decision of February, 1999, was anything but what it said it was: a denial of parole. The decision was not a revocation hearing decision, and the Board made no mention of the assessment of any "additional" backtime. Rather, Hargrove, just like any other prisoner, was merely denied parole and given a period of time after which he may be reviewed again. The twelve months of time which will elapse before he is reviewed again have nothing to do with Hargrove's backtime penalty. Hargrove is merely experiencing the same repetitive procedure of intermittent parole review that has occurred before each time he has been paroled in the past.

Duncan, then, has no application here because Hargrove's only backtime penalty was within the presumptive range for single

technical violations of parole, while Duncan only addresses the proper course of conduct when backtime penalties are assessed which are outside of that presumptive range. Penalties within the presumptive range for a given violation do not give rise to a basis for relief under Pennsylvania law. Dear v. Pennsylvania Board of Probation and Parole, 686 A.2d 423, 425 (Pa. Commw. Ct. 1996); Lotz v. Pennsylvania Board of Probation and Parole, 548 A.2d 1295, 1296 (Pa. Commw. Ct. 1988) ("This Court will not review [imposition of backtime] where the...backtime imposed is within the published presumptive range..."). In fact, challenges in Pennsylvania courts to backtime that is within the presumptive range are considered to be "wholly frivolous" by Pennsylvania courts and warrant assessment of costs and reasonable attorney's fees against Petitioner. Lotz, 548 A.2d at 1296. Since this Court finds Hargrove's claims of excessive backtime illusory, Hargrove is left with only a challenge to the original assessment of backtime, which even Hargrove agrees is reasonable. (Pet'r. Mem at 3.) Thus, Hargrove presents no claim to this court.[3]

Having exposed the fiction of Hargrove's backtime argument, this Court construes his complaint to challenge directly the legality of the February, 1999, denial of parole as well. Hargrove appears to argue that the Board violated his Fourteenth

[3] Even if Hargrove succeeded in convincing this Court of Duncan's applicability, the petition must still fail since Hargrove would now have a viable and unexhausted option in state court: an appeal from the Board's decision assessing excessive backtime.

Amendment due process rights by failing to use concrete criteria when denying him parole.[4]

Because Hargrove does not make this argument directly, it is unclear whether or not this ground should be based on a violation of procedural or substantive due process rights. In either case, Hargrove's due process claims may be dismissed as because he has failed to exhaust his state court remedies.

This Court may, however, decide to deny the petition on the merits. 28 U.S.C.A. § 2254 (b)(2)(West 1999)("an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). As such, the due process standard to which parole decisions are tested in federal habeas petitions is discussed below. This serves a dual purpose as well, since the essence of Hargrove's objections to Magistrate Judge Hart's Report and Recommendations are that this Court should excuse exhaustion on the basis of mootness. Since this Court will address the merits of Hargrove's initial complaint, Hargrove's objections of mootness become, well, moot.

A. Exhaustion of State Remedies

Ordinarily, before a federal district court may entertain a

[4] Certainly, a return to the language Hargrove used to introduce his "backtime" argument lends support to this interpretation: "THE BOARD'S DISCRETION IS REVIEWABLE TO DETERMINE IMPROPRIETIES TO DUE PROCESS, WHEN THE DISCRETION LACK CONCRETE CRITERIA TO SUPPORT ITS ORDER DENYING REPAROLE." (Pet. at 6.)

petition for writ of habeas corpus, the petitioner must exhaust his or her remedies in state court. Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995)(citing Story v. Kindt, 26 F.3d 402, 405 (3d Cir. 1994)). Under 28 U.S.C. § 2254(c), a petitioner will not be deemed to have exhausted state remedies if the right exists under state law to raise, by any available procedure, the question presented. Picard v. Connor, 404 U.S. 270 (1971). However, the exhaustion requirement may be excused where no available state corrective process exists or when particular circumstances are such that the state processes are ineffective to protect the applicant's rights. 28 U.S.C.A. § 2254(b)(1)(B) (West 1999). Regardless, in order to excuse exhaustion, state law must clearly foreclose state court review of the unexhausted claims. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993).

The existence of a state court avenue for review following the denial of parole has been the subject of some recent Pennsylvania and federal decisions.[5] Preliminarily, the United States Court of Appeals for the Third Circuit ("Third Circuit") has already tried to make sense of Pennsylvania's remedies

[5] Last month, the United States Court of Appeals for the Third Circuit filed a Petition for Certification of Questions of Law to the Pennsylvania Supreme Court requesting clarification of state law regarding the availability of judicial review of decisions to deny parole when a constitutional or statutory violation has occurred. Coady v. Vaughn, C.A. No. 98-1311, E.D. PA No. 97-CV-07498 (3d Cir. August 25, 1999)(expressing uncertainty as to "whether [the Pennsylvania courts] intended to foreclose direct review of parole denials that are alleged to violate constitutional rights other than the right to be free from deprivation of a liberty interest in parole"). Since this Court will deny Hargrove's petition on the merits, this certification petition does not impact the outcome of this case.

following a denial of parole. In Burkett v. Love, 89 F.3d 135 (3d Cir. 1996), the Third Circuit conjectured that three avenues are potentially available to a state prisoner seeking review from a denial of parole: first, by state petition for habeas corpus; second, by direct appeal in the Commonwealth Court; and third, by writ of mandamus.

Pennsylvania has expressly rejected Burkett's statement of its law. Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997). Weaver made clear that state habeas corpus and direct appeal are foreclosed to a prisoner seeking review from a denial of parole. Id.

Weaver explained that state habeas corpus is only appropriate as a challenge to the legality of a sentence or the conditions of a prisoner's confinement. Weaver, 688 A.2d at 770, 775 n. 17. Weaver's further decision to also disallow direct appeals flows from a recognition that Pennsylvania has not established any right to be paroled. Weaver, 688 A.2d at 770. Under Pennsylvania law, parole is a favor, and the prisoner has no protected liberty interest in being released before a legitimately imposed sentence has expired. Id. Since there is no liberty interest in being paroled, decisions by the parole board are not of the sort which give rise to appellate jurisdiction in a Pennsylvania court. Before a Pennsylvania court may entertain an appeal from a matter properly under agency

jurisdiction, that agency must have rendered a decision "affecting personal or property rights, privileges, immunities, duties or obligations," under Pennsylvania Administrative Agency Law. 2 Pa. Cons. Stat. Ann. § 101 (West 1999). In fact, appeals are expressly disallowed when they are "based upon a proceeding before a court or which involves...paroles." Id.

Weaver briefly discussed the possibility of Burkett's last conjectured avenue of relief: the writ of mandamus. Weaver, 688 A.2d at 776. "While mandamus may not normally be available for actions that involve an agency's exercise of discretion, it may lie where the agency's action is based upon a mistaken view of the law that it has discretion to act when it actually does not." Weaver, 688 A.2d at 776.

Pennsylvania's most recent and authoritative expression of its allowable remedies following a denial of parole is Rogers v. Pennsylvania Board of Probation and Parole, 724 A.2d 319 (Pa. 1999). In passing, Rogers recognized the potential viability of a writ of mandamus. Rogers, 724 A.2d at 323 n. 5. While the court repeatedly confirmed the lack of viability of a direct appeal, it nonetheless concluded that mandamus "is available to compel the Parole Board to conduct a hearing or to apply the correct law." Rogers, 724 A.2d at 323 n. 5.

Since Pennsylvania law theoretically permits its courts to entertain a writ of mandamus following a claim of an

unconstitutional denial of parole, the only remaining question is whether or not this remedy has any practical application which this Court will hold a petitioner responsible for exhausting. A brief survey of Pennsylvania law shows that it does have at least some practical application. In an opinion which does not mention Weaver, the Pennsylvania Commonwealth Court ("Commonwealth Court") recently entertained the merits of a petition for writ of mandamus following the denial of parole. Myers v. Ridge, 712 A.2d 791 (Pa. Commw. Ct. 1998). Myers held that the Commonwealth Court could grant a writ of mandamus following the denial of parole "to the extent that a constitutional or statutory violation had occurred." Myers, 712 A.2d at 794.

Recent decisions in this district conclude that mandamus must be pursued before a federal habeas petition may be entertained. Carter v. N.P. Muller, et al., 45 F.Supp.2d 453 (E.D.Pa. 1999); Cohen v. Horn, 1998 WL 834101 (E.D.Pa.). After discussing Burkett, Carter concludes, "the Pennsylvania courts provide a single avenue of relief to prisoners claiming their parole denials were unconstitutional: a mandamus action in the Commonwealth Court's original jurisdiction. Because [petitioner] did not exhaust this available remedy, ...his petition must be dismissed." Carter, 45 F.Supp.2d at 455.

Given the requirement in Burkett that state prisoners

exhaust mandamus before bringing a federal petition for habeas corpus, Burkett and its progeny compel this Court to find that the claims raised in Hargrove's petition are unexhausted.

B. Denial on the Merits: Due Process

Notwithstanding Hargrove's failure to exhaust his state court remedies, this Court, pursuant to powers granted in 28 U.S.C.A. § 2254(b)(2), will deny Hargrove's claims on the merits, under both procedural and substantive due process standards.

1. Procedural Due Process

The Fourteenth Amendment states in pertinent part: "nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV § 1. This provision protects individuals against arbitrary government action. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). To establish that the state has violated an individual's right to procedural due process, a petitioner must (1) demonstrate the existence of a protected interest in life, liberty, or property that has been interfered with by the state, and (2) establish that the procedures attendant upon that deprivation were constitutionally insufficient. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908, 104 L.Ed.2d 506 (1989).

To constitute a liberty interest, an individual must have a legitimate claim or entitlement to the subject of the

deprivation. Id. Since the Constitution does not provide any legitimate claim to parole, any valid interest must emanate from state law.[6] Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 11-12, 99 S. Ct. 2100, 2105-2107, 60 L.Ed.2d 668 (1979). Pennsylvania state courts have consistently held that parole is not a constitutionally protected liberty interest under state law. Rogers, 724 A.2d at 323.[7] See also Bradley, 1998 WL 150944, at *2 (holding that at the point when the petitioner completed his minimum sentence, no constitutional right to parole sufficient to trigger procedural safeguards had vested). Accordingly, Hargrove cannot succeed on a procedural due process claim.

2. Substantive Due Process

The Third Circuit has recognized a cause of action under substantive due process that is distinct from procedural due process. Burkett v. Love, 89 F.3d 135, 139-40 (3d Cir. 1996);

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[6] The U.S. Supreme Court's recent decision in Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L.Ed.2d 418 (1995), does not affect this analysis. Sandin held that states may create liberty interests cognizable under due process, but such interests are limited to "freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, ..., nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484, 115 S. Ct. at 2300.

While the Third Circuit has not addressed the subject, several appellate courts have held that Sandin is not relevant to parole cases. See Ellis v. Dist. of Columbia, 84 F.3d 1413, 1417-18 (D.C. Cir. 1996); Orellana v. Kyle, 65 F.3d 29, 32 (5th Cir. 1995). In addition, the Court expressly stated that the change in its methodology did not require overruling any of its prior holdings. Sandin, 515 U.S. at 484 n.5, 115 S. Ct. at 2300 n.5. Thus, Greenholtz is still good law.

[7] Federal courts are "bound by a state's interpretation of its own statute." Garner v. Louisiana, 368 U.S. 157, 166 (1961).

Block v. Potter, 631 F.2d 233, 236 (3d Cir. 1980). Even if no liberty interests or rights exist to a government benefit, there are certain reasons upon which the government may not rely in exercising its discretion. Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

Under substantive due process, a state may not deny parole on constitutionally impermissible grounds, such as race or in retaliation for exercising constitutional rights. Burkett, 89 F.3d at 140. Similarly, the Board may not base a parole decision on factors bearing no rational relationship to the interests of the Commonwealth. Block, 631 F.2d at 237.

Essentially, the duty of the parole board when reviewing applications for parole is to act in a manner that avoids making the parole process arbitrary, even though the granting of parole is a discretionary matter under § 331.21 of the Pennsylvania Parole Act. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). In other words, the mere presence of a large measure of discretion in the system does not alter the "fundamental due process limitation against capricious decisionmaking." Block 631 F.2d at 236. As such, when a court is faced with the review of a decision of a parole board, it must "insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible

considerations." Block, 631 F.2d at 236 (citing Zannino v. Arnold, 531 F.2d 687, 690 (3d Cir. 1976)).

Pennsylvania law grants the Board vast discretion to refuse or deny parole. State law authorizes the Board:

> to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to the board ... whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.

61 Pa. Cons. Stat. Ann. § 331.21 (West 1999).

Under Pennsylvania law, the Board's consideration encompasses many different factors, all relevant to the discretionary task of granting or denying parole. See 61 Pa. Cons. Stat. Ann. §§ 331.17, 331.21 (West 1999). Specifically:

> [i]t shall be the duty of the board...to investigate and inform itself respecting the circumstances of the offense for which said person shall have been sentenced, and, in addition thereto, it shall procure information as full and complete as may be obtainable with regard to the character, mental characteristics, habits, antecedents, connections and environment of such person.

61. Pa. Cons. Stat. Ann § 331.19 (West 1999).

Hargrove's parole decision comports with Pennsylvania's statutory requirements. The Board determined that Hargrove was ineligible for parole, and gave proscriptive recommendations to Hargrove so that he may be more favorably received when he is reviewed again in February, 2000. Those recommendations were that he should complete a substance abuse program, receive a

favorable recommendation for parole from the Pennsylvania Department of Corrections, and maintain a clear conduct record.

Certainly, nothing in the parole board decision intimates that the Board relied on any unconstitutional factors when it denied Hargrove's application for parole. Hargrove alleges no unconstitutional factors, either. His only complaint about the basis for his denial of parole is that they found him a danger and a threat to the community, when he contends he is "drug unsafe [sic] only." The Board's actual language is that, "the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." Given Hargrove's repeated inability to remain clear of drugs, the Board acted wholly within its discretion when it required Hargrove to complete a drug treatment plan before considering him again for parole. Similarly, requiring a parole recommendation from the Department of Corrections and a clear conduct record are within the Board's discretion.

Since the Board exercised discretion which was neither arbitrary nor capricious, Hargrove's substantive due process rights have not been violated. Block 631 F.2d at 236.

For these reasons, this Court denies Hargrove's Petition for Habeas Corpus.

IV. CERTIFICATE OF APPEALABILITY

In the event the Court does not agree with his Objections, Petitioner requests that he be granted leave to appeal the Court's decision to the Third Circuit.

Under 28 U.S.C.A. § 2253 (c)(1)(A), to appeal a final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, a defendant must first obtain a certificate of appealability from a district or circuit court judge. The Third Circuit recently held that Section 2253 (c)(1) authorizes a district judge to issue a certificate of appealability. United States v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997). The certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," and the showing must be made for each issue for which the certificate is sought. 28 U.S.C.A. § 2253 (c)(2), (3)(West Supp. 1997). Because, as discussed above, Petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court will not grant him leave to appeal this decision to the Third Circuit.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY HARGROVE	:	CIVIL ACTION
	:	
v.	:	
	:	
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, ET AL	:	NO. 99-1910

O R D E R

AND NOW, this day of October, 1999, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. No. 1) and Respondent's Answer and Memorandum of Law to Petition for Writ of Habeas Corpus (Doc. No. 6), and after review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart (Doc. No. 9), and consideration of Petitioner's objections to the Report and Recommendation (Doc. No. 12), and for the reasons set forth in the accompanying memorandum, **IT IS HEREBY ORDERED** that:

1. Petitioner's objections are **OVERRULED**;

2. The Report and Recommendation of Judge Jacob P. Hart is **APPROVED** and **ADOPTED**;

3. The Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED**;

4. Since the Petitioner has failed make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability under 28 U.S.C. § 2253(c)(2); and

5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:

_____
John R. Padova, J.